

Case Nos. 16-70397, 16-70756

**UNITED STATES COURT OF APPEALS
NINTH CIRCUIT**

CASINO PAUMA, an Enterprise of the PAUMA BAND OF LUISENO MISSION
INDIANS OF THE PAUMA & YUIMA RESERVATION, a federally-recognized
Indian Tribe;

Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD;

Respondent/Cross-Petitioner

and

UNITE HERE INTERNATIONAL UNION;

Intervenor

**UNITE HERE’S REPLY IN SUPPORT OF MOTION TO STRIKE
FACTUAL ASSERTIONS IN CASON PAUMA’S OPENING BRIEF THAT
ARE NOT SUPORTED BY CIATIONS TO THE AGENCY RECORD**

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The basis for UNITE HERE's motion is straightforward. Pauma filed a petition for review of a National Labor Relations Board ("NLRB") order. Federal Rules of Appellate Procedure 16(a) and 28(a) confine this Court's review to the record created in the proceeding before the NLRB. Instead of following those rules, Pauma filed an opening brief that makes numerous factual assertions that are not supported by citations to the agency record and which Pauma admits are not contained in that record. Circuit Rule 28-1 permits the Court to strike noncompliant briefs. UNITE HERE did not ask the Court to strike Pauma's entire brief, although that is permitted by Circuit Rule 28-1. UNITE HERE simply asked the Court to strike the factual assertions that are not supported by citations to the agency record.

Moving to strike noncompliant assertions in a brief is not gamesmanship. It aids the appellate process by allowing the Court focus on the arguments that are supported by the administrative record. A brief cluttered with irrelevant material, such as the one Pauma filed, will only hinder the Court's work.

Pauma asserts that some of the facts that it failed to present to the NLRB are merely "background facts." There is not a "background facts" exception to the rule limiting record on appeal to the record that was created before the NLRB. If the background facts were relevant, then Pauma should have introduced evidence proving those facts in the administrative proceeding so that the NLRB could make

factual findings, and consider those findings when making its decision. Because Pauma did not offer the evidence at the administrative hearing, the evidence could not be tested through cross-examination and the other parties could not present rebuttal evidence.

Pauma complains that the NLRB's Administrative Law Judge prevented it from introducing evidence into the record. If that were the case, Pauma could cite to the administrative record to demonstrate that it offered evidence, the offer was rejected, and any rejected exhibits were placed in the "rejected exhibits" file.¹ Pauma has not done so, presumably because the record does not reflect that Pauma offered this evidence at the administrative hearing.

Pauma makes another argument that appears to be inconsistent with the prior argument. Pauma says that it did not introduce this evidence in the administrative proceeding because UNITE HERE "failed to disclose [the evidence] during the administrative proceeding." Pauma's Op., at 2. Pauma provides no support for the theory that UNITE HERE wrongfully withheld evidence or that UNITE HERE had any obligation to disclose that facts that Pauma claims to have belatedly

¹ In NLRB proceedings, the record includes rejected offers of proof and a "rejected exhibits" file, where documents offered as part of a rejected offer of proof are placed, upon any party's request. *Omaha World-Herald*, 357 NLRB 1870, 1872 n. 13 (2011); *Crown Corrugated Container, Inc.*, 123 NLRB 318, 320 (1959).

discovered. Moreover, the remedy for a wrongful “failure to disclose” (if it had occurred) is not to allow the other party to assert facts in its brief on appeal.

Next, Pauma cites *Bethlehem Steel Corp. v. U.S. EPA*, 638 F.2d 994 (7th Cir. 1980). In that case, the Court allowed a party to supplement the record with “internal EPA memoranda” because the appellant asserted that those memoranda revealed how the EPA made the decision at issue in the case. *Id.* at 1000. Pauma does not seek to supplement the record with any evidence that is even remotely comparable.

Finally, Pauma says that the Court should overlook its violation of the rules because the Court may take judicial notice of evidence that is not contained in the agency record. There are two problems with this argument. First, Pauma did not request judicial notice of specific facts or supporting documents. If it had, then UNITE HERE (and the NLRB) could respond to those requests, explaining whether judicial notice is appropriate and whether the evidence meets other standards of admissibility.

Second, many of the unsupported factual assertions in Pauma’s brief are not appropriate for judicial notice. “A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid.

201(b). The factual assertions in Pauma's brief do not meet this standard. As explained in UNITE HERE's Motion, the sources that Pauma provides for many of these assertions are complaints that Pauma filed in other lawsuits. Pauma does not ask the Court to take notice of the fact that it filed those lawsuits. Rather, it asks the Court to accept as true the allegations it made in those complaints. Facts are not judicially-noticeable just because they are alleged in a complaint.

Finally, Pauma complains that UNITE HERE identified only the pages on which the inappropriate assertions appear and did not create an index of them. The assertions in Pauma's Opening Brief that are not supported by citations to the administrative record are easily identified. Pauma cites to the administrative record with the abbreviation "ER" for "Excerpts of Record". All factual assertions that are not supported by a citation to "ER" should be stricken, just as Rule 28(a) requires. Alternatively, Pauma should be ordered to refile its brief without such assertions. If the Court so desires, UNITE HERE will submit a detailed index of the unsupported factual assertions.

/s/ Kristin L. Martin

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Dated at San Francisco, CA
this 1st day of December, 2016

9th Circuit Case Number(s) 16-70397 & 16-70756

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